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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2008

THOMAS M. AYRE,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE CRIMINAL COURT OF BALTIMORE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY COMMENTS

This Brief in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

OPINIONS BELOW

On November 30, 1973, Judge Charles D. Harris, sitting in the Criminal Court of Baltimore City, found Petitioner guilty in Criminal No. 3701598 of possession of obscene materials with the intent to sell them under Maryland Code, Article 27, Section 418. Petitioner then applied to

the Maryland Court of Special Appeals for a Writ of Certiorari and the petition was denied without comment on February 7, 1974. Thereupon, Petitioner applied to the Maryland Court of Appeals, and on April 11, 1974, that Honorable Court denied the Petition for Writ of Certiorari for the reason that "there has been no showing that review by certiorari is desirable and in the public interest". A copy of the Order of the Court of Appeals *denying* certiorari has been set out in Appendix "B" in Petitioner's brief.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Honorable Court pursuant to the provisions of Title 28 of the United States Code, Section 1257.

QUESTIONS PRESENTED*

I. Whether or not the charging document was sufficient to charge Petitioner of the crime of which he was convicted?

II. Whether or not the prohibitions of Article 27, Section 418, are vague and over-broad, so as to unduly restrict Petitioner's First Amendment Right to freedom of expression?

III. Whether or not Petitioner was denied his right to a jury trial in the case where the judge, sitting in the Criminal Court of Baltimore, was precluded from sentencing Petitioner to any more than the $100 fine and costs, which penalty had been imposed at the District Court level?

---

* Although Petitioner has listed some seven questions, Respondent has couched all of Petitioner's questions in terms of the four questions listed in this Brief in Opposition to Petition for Writ of Certiorari.

IV. Whether or not the statute (Article 27, Section 418), under which Petitioner was convicted, denied him equal protection of the law in that there are exempted from prosecution certain persons such as employees of theatres?

STATUTES INVOLVED

Petitioner contends that the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution are involved. Petitioner also maintains that Sections 417, *et seq.*, of the Maryland Code are involved.

STATEMENT OF THE CASE

Petitioner was charged in the District Court of Maryland with possession of an obscene magazine with the intent to sell same under Article 27, Section 418 of the Maryland Code. On August 9, 1973, Petitioner was tried before Judge Edgar P. Silver in the District Court of Maryland, found guilty, and fined one hundred dollars. Petitioner then appealed to the Criminal Court of Baltimore City and filed a prayer for a jury trial and a motion to dismiss the charge against him. The case came on for a hearing on October 29, 1973, before Judge Charles D. Harris. Judge Harris denied both the request for a jury trial and the motion to dismiss. The trial of the matter took place on November 30, 1973. Judge Harris found Petitioner guilty and imposed the same fine as was imposed at the District Court level.

As is recanted under "Opinions Below", *supra*, both the Maryland Court of Special Appeals and the Maryland Court of Appeals have denied Petitioner's Writs of Certiorari to those respective courts.

STATEMENT OF FACTS

On June 26, 1973, at approximately 12 noon, Baltimore City Police Sergeant Donald Daugherty went to the Baltimore News Center at 428 East Baltimore Street, in Baltimore City. There he purchased from Petitioner, who was behind the counter at the front of the store, a magazine entitled "The Sex Scene". (At the request of this Honorable Court, Respondent has delivered to this Court the magazine in question and a copy of the trial transcript, which transcript was typed through the efforts of Petitioner.)

ARGUMENTS

I.

THE CHARGING DOCUMENT WAS SUFFICIENT TO CHARGE PETITIONER WITH POSSESSION OF AN OBSCENE MAGAZINE WITH THE INTENT TO SELL SAME.

Petitioner maintains that the charging document (Arrest Warrant) failed to set forth a crime in that it charges possession with intent to sell, whereas the crime under the statute prohibits possession with intent to distribute. Respondent submits that in this question (as with all four questions presented by Petitioner) no substantial federal question has been presented (Supreme Court Rule 19), nor has Petitioner shown a conflict between existing Maryland law and existing constitutional law as enunciated by this Honorable Court. Therefore, this question, and the other three questions, are not properly reviewable by way of certiorari to the Supreme Court of the United States.

Notwithstanding this, Respondent would point out that the charging document alleges that Petitioner "unlawfully and knowingly did possess obscene and indecent books, drawings, pamphlets, pictures, etc., with intent to sell in Baltimore City, State of Maryland".

Black's Law Dictionary, 4th Ed., defines the word "distribute" to mean: "To deal or divide out in proportion or in shares". It is therefore clear that the word "sell" used in the charging document comes within the broader term of "distribute". Hence, the charging document was sufficient in this regard.

Petitioner also alleges that the charging document is insufficient because it does not specifically identify the material alleged to be obscene. The charging document refers to "indecent books, drawings, pamphlets, pictures, etc.". The trial transcript indicates that a sale took place wherein the magazine in question was sold to police authorities. Therefore, under Maryland Rule 728, Petitioner had a right to inspect at a reasonable time prior to trial, all of the items which were obtained by the police and which could or would be used in evidence against him. Therefore, Petitioner has had the means available to him to ascertain what, if any, evidence the prosecution authorities intended to use against him so as to prove an intent to sell obscene materials. Therefore, there would appear to be no prejudice to Petitioner in this respect. The essential purpose to be kept in mind in charging a defendant with criminal conduct is "two-fold, that is the charge must so characterize the crime and describe the particular offense 'as to put the accused on notice of what he is called upon to defend and to prevent a future prosecution for the same offense'. *Gray v. State*, 216 Md. 410, 415 [1958]" *Lank v. State*, 219 Md. 433 (1959), at page 436. The following quotation from *Hamling v. United States*, ___ U.S. ___, 94 S. Ct. 2887 (1974), at page 2907, is particularly applicable:

> "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or am-

> biguity, set forth all the elements necessary to constitute the offense intended to be punished.'" (Citing, *inter alia, United States v. Carll,* 105 U.S. 611 (1882).)

Respondent also asserts that the word "etc." does not render the charging document defective and merely is a generic term to indicate materials which were likened to previously referred to books, drawings, pamphlets and pictures. Because the magazine falls within the category of books, the addition of "etc." does not affect the validity of the charging document.

Therefore, the charging document was sufficient to charge Petitioner of the crime of which he was convicted.

II.

THE PROHIBITIONS OF ARTICLE 27, SECTION 418, ARE NOT VAGUE AND OVER-BROAD SO AS TO UNDULY RESTRICT PETITIONER'S FIRST AMENDMENT RIGHT TO FREEDOM OF EXPRESSION.

Petitioner maintains that Article 27, Section 418, is vague, over-board and constitutes a prior restraint contrary to the First Amendment of the United States Constitution. Section 418, of Article 27, provides as follows:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

Respondent respectfully submits that "obscene" does not have a vague or over-board meaning and is adequately defined under existing Maryland statutes and case law. The opinion of the Court of Special Appeals of

Maryland in *Ebert v. Maryland State Board of Censors*, 19 Md. App. 300 (1973), holds that it is not necessary that the individual states desiring to regulate obscene material now enact new statutes (in light of *Miller v. California*, 413 U.S. 15 (1973), and the accompanying cases). *Ebert* points out that existing statutes as construed before *Miller*, or thereafter, may well be adequate. As that Court said in *Village Books, Inc. v. State*, ___ Md. App. ___, 323 A.2d 698 (1974), at page 701:

> "What we did in *Ebert* with respect to Code [Maryland], Article 66A, and what we do in this opinion with regard to Code, Article 27, Section 418 and Section 418A, is to follow the dictates of the Supreme Court as to the basic guidelines for the trier of fact under the reformulated test for the determination of obscenity announced in *Miller*."

See also *Woodruff v. State*, 11 Md. App. 202, 205 (1971), wherein the Maryland Court of Special Appeals points out that the Maryland courts, trial and appellate, are bound by the definition of obscenity as enunciated by the Supreme Court of the United States, and that the Maryland Legislature intended to use the word "obscene" to mean that which the word "obscene" means in the prevailing leading legal thought. Hence, Maryland case law defines "obscene" as it is defined by the United States Supreme Court. *Ebert* sets out "basic guidelines" for the trier of fact in determining whether contested materials are obscene. They are:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, * * *,
>
> "(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and

> "(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, ___ U.S. at ___, 93 S. Ct. at 2615 *(citations omitted)*.

Thus, Section 418 is not vague or over-broad. Nor does the statute constitute a prior restraint in light of *Miller* as interpreted by *Ebert* so long as there is present the "patently offensive 'hard-core' sexual conduct" specifically defined by Maryland case law.

Petitioner also alleges that Section 418 fails to define hard-core sexual conduct. Respondent would direct this Honorable Court's attention to *Ebert, supra:*

> "Existing state statutes 'as construed heretofore or hereafter, may well be adequate'." Citing *Miller*, page 2615.

Ebert further points out that the Supreme Court made clear that the applicable state statute may contain the required definitions either as written or "authoritatively construed". Although the *Ebert* opinion dealt with the approval of films by the Maryland State Censor Board under the licensing regulations of Article 66A, the holding still defines obscenity under Maryland law in light of *Miller*. The Board may disapprove any film, applying the standards under the definition set out as per *Ebert*. See especially *Hamling, supra, Village Books, Inc., supra,* and *Jenkins v. Georgia,* ___ U.S. ___, 94 S. Ct. 2750 (1974).

Respondent would emphasize that Petitioner has in no way shown a conflict between Maryland case law and the Supreme Court decisions in *Miller* (and its siblings), or *Hamling* or *Jenkins*. Therefore, Section 418, as construed by Maryland case law, with the backdrop of *Miller*, does specifically define the obscene material which it prohibits.

Petitioner also maintains that there was no usable definition of obscenity at the time of the trial (October 29, 1973 and November 30, 1973), and that the judicial interpretation given Section 418 at the time of trial could not be retroactive so as to apply to the offense at bar. The *Miller* case was decided June 21, 1973, and the offense at bar was alleged to have taken place on June 26, 1973. The answer to Petitioner's contention in this regard is that since the *Miller* case preceded the offense, the guidelines set forth in *Miller* (as repeated in *Ebert*) would therefore apply to the offense at bar and to give ample notice to the offender; nor was Section 418 without prior case law interpretation. See *Village Books v. Marshall*, 263 Md. 76, (1971) re-aff'd by the Maryland Court of Appeals in 269 Md. 748 (1973) after being vacated by this Court in 413 U.S. 911 (1973).

III.

PETITIONER WAS NOT DENIED THE RIGHT TO A JURY TRIAL IN THE PRESENT CASE WHERE MARYLAND LAW PRECLUDED THE JUDGE SITTING IN THE CRIMINAL COURT OF BALTIMORE FROM SENTENCING PETITIONER TO ANY MORE THAN THE ONE HUNDRED DOLLAR FINE (AND COSTS), WHICH PENALTY HAD BEEN IMPOSED AT THE DISTRICT COURT LEVEL.

Petitioner maintains that he was entitled to a jury trial when he requested same at the Criminal Court of Baltimore level below. According to Petitioner, Judge Harris denied his request for a jury trial because the sentence below (one hundred dollars and costs) was less than the requisite six months or more sentence which would have entitled him to a jury trial. Additionally, Judge Harris imposed the same sentence at the Supreme Bench level as had been imposed at the District Court level.

Respondent respectfully asserts that Judge Harris was correct in his denial of Petitioner's request for a jury trial. It is clear that had Petitioner been subject to a sentence of six months or more, he would have had the right to a jury trial. See *Baldwin v. New York,* 399 U.S. 66, 69 (1970). However, when Petitioner appeared before Judge Harris on his appeal, which entitled him to a trial *de novo,* Judge Harris indicated that he was denying the jury trial since the penalty imposed in the District Court was a one hundred dollar fine and costs and hence he was of the opinion that he could not increase the sentence. Judge Harris denied the request for a jury trial because he was precluded from increasing the penalty beyond a six months period, which would have entitled Petitioner to a jury trial. See Maryland Code Article 27, Section 424, which provides a maximum penalty of one year and one thousand dollars. Additionally, Section 424 provides that a subsequent violation is subject to incur a maximum of five years and a five thousand dollar fine.

An analogous situation occurred in *State v. Roll and Scholl,* 267 Md. 714 (1973), wherein two contemnors had been sentenced in contempt proceedings each to sentences of four months and sixteen days. The Court of Appeals, in remanding the cases for further proceedings, pointed out that if each individual were later to be found in criminal contempt, the sentence imposed could not exceed the originally imposed four months and sixteen days. The Court of Appeals referred to *North Carolina v. Pearce,* 395 U.S. 711 (1969), which held that when a conviction is reversed and a person tried a second time, he may not receive a greater sentence than was imposed at the first trial unless there affirmatively appears identifiable conduct on the part of the defendant occurring after the time of the original

sentencing. See also *Moon v. Maryland,* 398 U.S. 319 (1970). Therefore, in the present situation, as there apparently existed no new reasons why Judge Harris might impose a harsher sentence than was imposed at the District Court level, Judge Harris could only impose the previously imposed sentence below, which sentence was below the six months threshold in *Baldwin.*

Nor is there any merit in Petitioner's contention that if Petitioner were subsequently convicted of the same offense, he would be subject to a possible five years imprisonment and a fine of five thousand dollars. At the time Petitioner appeared before Judge Harris, as is pointed out above, he was subject only to a fine of one hundred dollars and costs, and Petitioner was in no way subject at that time to a greater penalty than that imposed at the District Court level. The possibility that future conduct by the Petitioner might, coupled with the conviction at bar, subject him to a possible penalty of five years and five thousand dollars, was not a reality at the time he appeared before Judge Harris, and hence he was not subject to the five year term and five thousand dollar penalty.

Therefore, Respondent would emphasize that there is no substantial federal question, nor is there a conflict between the application of Maryland law and existing constitutional law.

IV.

THE STATUTE UNDER WHICH PETITIONER WAS CONVICTED WHICH EXEMPTED FROM PROSECUTION CERTAIN PERSONS, SUCH AS EMPLOYEES OF THEATRES, DID NOT DENY HIM EQUAL PROTECTION OF THE LAWS.

Respondent would first call this Honorable Court's attention to the fact that although Petitioner appears to

have raised this issue in the Criminal Court of Baltimore (see Petitioner's Appendix at pages A3 and A5), he did not present this issue to the Maryland Court of Special Appeals or to the Maryland Court of Appeals when he sought review by way of certiorari to those courts. Hence, the matter is not reviewable by the Supreme Court of the United States as Petitioner has not preserved this issue in that he has not given the Maryland appellate courts an opportunity to decide same.

Petitioner has reference to Maryland Code Section 417, whereby, in effect, motion picture theatre employees who are not officers of a theatre and have no financial interest therein, are exempt from prosecution under Section 418. Petitioner also makes reference to Section 423, which exempts from prosecution certain *bona fide* scientific, educational and governmental institutions. The exemption for *bona fide* governmental, scientific and educational institutions is so clearly distinguishable from Petitioner's situation, wherein none of these defenses were shown, that little comment is called for. Additionally, Petitioner in no way below showed that the Maryland Legislature had no rational basis to distinguish employees of theatres from persons in Petitioner's position who are selling certain materials in stores.

Again, Petitioner has shown no substantial federal question, nor has he shown a conflict between Maryland law and constitutional law as espoused by this Honorable Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari to the Criminal Court of Baltimore should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of October, 1974, I served a copy of Brief in Opposition to Petition for Writ of Certiorari in the above entitled case, by depositing same in the United States mail, postage prepaid, to

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